HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 906 OF 1994.

M/s. Seike Kering & Associates,
A registered partnership Firm,
having its registered Office
at Commerce House, Medow Street,
Fort, Bombay - 400 023. ..Appellant.

Versus.

Shri. Inder Dharmdas Bhambani,
Age about 50 years, Occu: Business,
17, Samir Apartments, Bund Garden Rd,
Pune - 411 001. ..Respondent.

Shri. K. Y. Mandlik for the appellant.

CORAM: S.B.MHASE &
S.R.SATHE JJ

DATE: October 06, 2006.

ORAL JUDGMENT (PER S.B.MHASE,J.).

1. This appeal is directed against a judgment and decree passed in Special Civil Suit No. 750 of 1990, dated 25.10.1993 by the 4th Joint Civil Judge, Senior Division, Pune.

2. The appellant - original plaintiff has filed Special Civil Suit No. 750 of 1990 claiming an amount of Rs.35,15,000/- with an interest at the rate of 18% p.a. from the date of filing of the suit till recovery of the amount, and also the costs of suit. However,

4th Joint Civil Judge, Senior Division, Pune granted a decree in favour of the appellant for an amount of Rs.2,48,000/- together with an interest at the rate of 18% p.a. from the date of filing of the suit till the realisation of the amount. So also, the proportionate costs was granted. Since the decree as prayed for Rs.35,15,000/- with an interest at the rate of 18% p.a. is not granted, the original plaintiff has approached this Court by filing this appeal.

3. Learned counsel Shri. Mandlik very vehemently submitted that instead of granting a decree for Rs.2,48,000/- with an interest at the rate of 18% p.a., the trial Court should have grated a decree for Rs.35,15,000/- with an interest at the rate of 18% p.a. According to the learned counsel, the trial Court has directed to return the amount of Rs.2,48,000/- which was paid to the respondent. However, he has submitted that the amount of Rs.52,000/- was paid to the Solicitors in view of the agreement dated 17.7.1980 (Exhibit-35) and therefore, there should have been a decree for the said amount. Learned counsel further submitted that the trial Court should have taken into consideration that, had the property bearing House No.2, Sholpaur Bazar and G. L. R. No. 390/3030 within the limits of Cantonment Board admeasuring 6,408

sq. ft. as described in the plaint, been transferred in favour of the appellant as per the agreement dated 17.7.1980, the appellant - original plaintiff could have constructed in the said property, shops, offices, mezzanine floor, first floor upto 5th floor, a total saleable area of 30,119 square feet, and thus after making payments to the tenants in the said property he would have earned Rs.32,15,000/- by way of income, however, he claims that since the respondent has not paid the conversion tax in respect of the said property and since the execution of the agreement could not materialise, apart from the actual payments, the appellant is put to the loss of Rs.32,15,000/-, as detailed in the Schedule to the plaint.

4. The trial Court, however, granted a decree in respect of Rs.2,48,000/-, i.e., the decree has been passed in respect of the amount which has been actually paid to the defendant. The decree in respect of Rs.52,000/- which was paid, according to the appellant - plaintiff, to the Solicitors - Kanga & Compnay was not passed by the trial Court, since the said Solicitor is not a party to the suit. As against this, the decree in respect of Rs.32,15,000/- which was claimed by way of damages by the appellant was denied since those damages were not actual, but were

hypothetical.

5. We have given our anxious thoughts to the evidence, the pleadings and the judgment of the trial Court. We also find an amount of Rs.52,000/- has been paid as per the agreement dated 17.7.1980 to the Solicitors, however, the said Solicitors being not a party to the suit, it would be appropriate and just on the part of the trial Court not to grant a decree in respect of Rs.52,000/- as against the respondent, because this amount was not received by the respondent.

6. So far as the claim of damages for Rs. 32,15,000/- is concerned, the said claim is based on a fact that - had the appellant came into possession of the said property as a owner and had he constructed on the said property, building upto 5th floor, what would have been his business earnings. That has been hypothetically calculated by the appellant - plaintiff. When there are damages as a result of the non performance of contract those damages are governed by Section 73 of the Indian Contract Act, 1872. This section contemplates damages which are direct and consequential as a result of the breach of the agreement of the contract. It is well settled principle, the damages which are remote and

hypothetical shall not be granted, and the trial Court has considered the said provisions of the Contract Act and thereafter has refused to grant damages of Rs.32,15,000/-. We find that the reasons given for the rejection of the said claim by the trial Court are just and proper and no interference is called for from this Court.

7. In the result, the appeal is without any substance and is hereby dismissed. In the facts and circumstances the appellant shall bear his own costs.

Decree be drawn up accordingly.

(S.R.SATHE,J.) **(S.B.MHASE, J.)**

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